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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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Decisions of the United States Court of International Trade

(Slip Op. 85–130)

ALHAMBRA FOUNDRY, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT AND SOUTH BAY FOUNDRY, ET AL., INTERVENORS

Court No. 83–4–00500

Before Carman, *Judge.*

MEMORANDUM OPINION AND ORDER

[Plaintiffs' motion for judgment upon the agency record granted in part and denied in part.]

(Decided December 30, 1985)

Simonelli & Hall (*Michael H. Hall* on the motion) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*A. David Lafer* on the motion) for the defendant.

Brownstein, Zeidman & Schomer (*David Amerine* and *Irwin Altschuler* on the motion) for the intervenor.

CARMAN, *Judge:* In this action plaintiffs challenge a final affirmative countervailing duty determination of the Department of Commerce, International Trade Administration (ITA) regarding ironmetal construction castings from Mexico. *see* 48 Fed. Reg. 8834 (1983). Defendant and defendant-intervenors oppose the motion and claim that the final determination, issued pursuant to 19 U.S.C. § 1303 (1982), is supported by substantial evidence upon the administrative record.

BACKGROUND

Subsequent to plaintiffs' petition alleging that numerous governmental programs conferred bounties or grants upon the ironmetal construction castings industry in Mexico, the ITA made an affirmative preliminary determination and stated that it was investigating the alleged subsidization practices from January 1 to September 30, 1982. 47 Fed. Reg. 56377 (1982). In issuing the preliminary determination published on December 16, 1982, the ITA was required to use the "best information available" in accordance with 19 U.S.C. § 1677e, since the ITA had not yet received responses to its counter-

vailing duty questionnaire from the Mexican government. On the basis of this information, presumedly much of it obtained from petitioners (*see* Record at 136, letter from plaintiffs), the ITA estimated the net bounty or grant to equal 40.53 percent *ad valorem.*

In the final determination reached February 17, 1983, the ITA determined the net bounty or grant to be 2.85 percent *ad valorem.* The verification report, however, was not placed in the record until March 8, 1983. Upon plaintiffs' motion for reconsideration of its motion to strike the verification report from the record and defendant's cross-motion for remand in order to allow all parties to provide the ITA with comments on the report and accompanying exhibits, the Court, on July 2, 1984, granted the cross-motion for remand. The ITA filed its remand results on September 11, 1984, and concluded that no changes in the final determination were warranted.

The final determination stated the following programs constituted countervailable subsidies:

(1) FOMEX [1] pre-export and export financing loans at preferential interest rates;
(2) FONEI [2] long-term financing at preferential interest rates;
(3) FOGAIN [3] priority industry/regionally targeted financing at preferential interest rates;
(4) State tax incentives; and
(5) Import duty reductions and exemptions (although the ITA found that the production facilities used in the manufacture of the subject product did not appear to have been imported).

The ITA determined that CEPROFI [4] tax credits conferred bounties or grants, but had not been granted for the production of merchandise subject to the investigation, and that the CEDI [5] program, also providing countervailable tax certificates, had been suspended.

The following programs were determined not to confer bounties or grants:

(1) Government control of Mexican iron and steel industries;
(2) Dual level currency exchange;
(3) Free zone and in-bond assembly programs; and
(4) COMESEC Mexican credit insurance at preferential rates.

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[1] FOMEX (Fund for the Promotion of Exports of Mexican Manufactured Products) is a government trust which provides low-interest loans to Mexican companies to promote the manufacture and sale of exported products. 48 Fed. Reg. at 8834.

[2] FONEI (Fund for Industrial Development) is a specialized financial development fund, administered by the Bank of Mexico, which grants long-term credit at below-market rates for the creation, expansion or modernization of enterprises and to foster industrial decentralization. 48 Fed. Reg. at 8835.

[3] FOGAIN (Fund for the Guarantee of Development of Medium and Small Industry) provides financing at interest rates below prevailing commercial rates based upon whether a small or medium business has a designated priority status or based upon its geographical location. 48 Fed. Reg. at 8835.

[4] CEPROFI (Certificates of Fiscal Promotion) are nontransferrable tax certificates used to promote the goals of NIDP. These tax credits are provided to Mexican companies for locating in certain regions, investing in certain infant industries, generating jobs, investing in new plants and equipment, and purchasing Mexican capital goods. 48 Fed. Reg. at 8836.

[5] CEDI (Certificado de Devolucion del Impuesto), suspended by the Mexican Government in August 1982, was also a tax rebate. The certificates were direct export subsidies with their value equal to a percentage of the value of qualifying exports. 48 Fed. Reg. at 8836.

Finally, the ITA determined that the following programs were not used by the iron-metal construction castings industry:

(1) Government-financed facilities;
(2) Mexican Institute for Foreign Trade (IMCE) promotional benefits;
(3) Trust for Industrial Parks, Cities, and Commercial Centers (FIDEIN) benefits;
(4) National Preinvestment Fund for Studies and Parks (FONEP) benefits;
(5) Favorable tax treatment;
(6) Discounts on Industrial Energy and Basic petrochemicals; and
(7) FOMIN [6] preferential financing.

Plaintiffs in this action now make the following challenges, as the Court discerns them, to the final determination of the ITA:

(1) the ITA failed to explain in its determination how it arrived at the benchmark interest rates used in calculating FOMEX and FONEI benefits;
(2) the ITA failed to properly determine the subsidy amounts from FONEI and FOGAIN financing;
(3) the ITA failed to fully investigate the extent of receipt of state tax exemptions, or free or low-priced land incentives;
(4) the ITA failed to properly calculate the benefit of a state tax exemption received;
(5) the ITA failed to investigate import duty reductions and exemptions for equipment purchased prior to the investigation;
(6) the determination that the receipt of a CEPROFI tax credit was connected only to merchandise not the subject of the investigation is unsupported by substantial evidence;
(7) the ITA's determination that the dual level currency exchange does not confer a bounty or grant is unsupported by substantial evidence;
(8) the ITA failed to investigate whether FOMEX loan guarantees conferred bounties or grants;
(9) the ITA's determination that none of the firms received IMCE benefits is unsupported by substantial evidence;
(10) the ITA failed to investigate benefits from FIDEIN industrial park programs;
(11) the ITA failed to investigate benefits provided by National Financeria, S.A.;
(12) the ITA's determination that the Mexican construction castings industry did not receive discounts on basic petrochemicals or industrial energy supplies is unsupported by substantial evidence;
(13) the ITA failed to investigage whether foreign debt restructuring constituted a bounty or grant;

[6] FOMIN (Fondo National de Fomento Industrial) operates as a trust fund and provides funding to companies through stock acquisition or the provision of convertible loans at rates below those of commercial lending institutions. 48 Fed. Reg. at 8837.

(14) the ITA failed to set forth in its determination the exchange rates used to calculate the net benefit received by the Mexican construction castings industry; and

(15) the verification report submitted subsequent to the final determination should not be included as part of the administrative record.

OPINION

Judicial review of a final countervailing duty determination is provided under 19 U.S.C. § 1516a(b)(1)(B) (1982), which requires the court to hold the determination unlawful if it is found "to be unsupported by substantial evidence upon the record, or otherwise not in accordance with law." The standard of review has been well explicated in many judicial decisions, *see Carlisle Tire and Rubber Co.* v. *United States,* 9 CIT ———, Slip Op. 85-110 (October 24, 1985), but is essentially a limited review of the agency determination, insuring that agency conclusions are reasonably drawn from some evidence, more than a mere scintilla, in light of the record as a whole. However, the court is not placed in the position of having to weigh the evidence. *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 620 (1966). With these considerations in mind, the Court concludes that twelve of the determinations and conclusions contested by plaintiffs in this action are supported by substantial evidence upon the record. In those instances where the Court is not able to affirm the administrative determinations, it is primarily because information in the record and the briefing is not sufficiently clear to enable the Court to meaningfully review the issues or to determine what actually transpired during the investigation. These three issues—challenge two to the calculation of FONEI and FOGAIN benefits, challenge four to the calculation of the state tax benefit, and challenge fourteen to the failure to set forth exchange rates—must therefore be remanded to the ITA.

1. *Commercial Interest Rates*

In calculating the benefits from the Fund for the Promotion of Exports of Mexican Manufactured Products (FOMEX), the ITA used as a benchmark for the commercial rate of interest the national average commercial rate for comparable short-term peso or dollar-denominated loans during the first nine months of 1982 as determined from information supplied by the Department of the Treasury. 48 Fed. Reg. at 8835. The source of Treasury's information was in turn the Bank of Mexico's publication *Economic Indicators.* Administrative Record at 474-76. For the Guarantee and Development Fund for Medium and Small Industries (FOGAIN), the ITA used as their benchmark the national average commercial interest rate for comparable peso-denominated loans in 1981 as provided by the Department of the Treasury, 48 Fed. Reg. at 8835-36. For the Fund for Industrial Development (FONEI), the ITA used the 1977 average commercial rate for peso-denominated loans as

obtained from the Mexican government's *Diario Official. Id.* at 8835. Plaintiffs' contention that the determinations of benchmark interest rates must be explained is therefore unfounded. It is presumed that the Treasury Department acted with regularity in obtaining interest rate data. It was therefore reasonable for the ITA to rely on this information, as well as that provided by official publications of the Mexican government, as "the best information otherwise available" in determining its benchmark interest rates for purposes of this investigation. *See* 19 U.S.C. § 1677e (1982).

2. *Calculation of FONEI and FOGAIN Benefits*

Plaintiffs contend that the methodology used by the ITA in calculating these benefits failed to take into account all of the costs which would be incurred in obtaining commercial loans in Mexico. First, maintain plaintiffs, the ITA's methodology of comparing payment streams of hypothetical commercial loans using the benchmark interest rates with the payment streams of the subsidized loans disregarded the Mexican practice with respect to both commercial loans and subsidized loans of requiring the payment of interest at the beginning of loan periods. *See* Administrative Record at 146, 602, 576, 1116. According to plaintiffs, "[t]he result is reduction in the calculated benefit, resulting from treating each benefit as occurring one year too late in the loan period. The effect is to decrease the total grant equivalent, since each benefit is discounted for an extra year at the benchmark rate in the benefit calculation." Plaintiffs' brief at 19–20.

Plaintiffs, citing Administrative Record at 682–96, 576, allege that the ITA failed to account for 3-month holidays from the repayment of principle of certain FOGAIN loans, and further citing Administrative Record at 146, 602, that the payment of commissions and maintenance of compensating balances for commercial loans were not taken into account.

In response to these contentions, defendant argues simply that "[t]he ITA's methodology does not have to be the most reasonable in order to be upheld by this Court nor need it be the methodology that this Court would have selected had it been the decisionmaker. *Asahi Chemical Industry Co.* v. *United States,* 4 CIT 120, 123, 548 F. Supp. 1261, 1264 (1982)." Defendant's Brief at 18. While the Court agrees that the ITA in its discretion may choose one methodology or another in calculating the benefits of bounties or grants, any methodology employed must reasonably accurately reflect factual information in the administrative record. It does not readily appear from the record or the briefs that the ITA took into account in the calculation of FONEI and FOGAIN benefits the payment of "up-front" interest, 3-month holidays from the payment of principle on FOGAIN loans, and the payment of commissions and maintenance of compensating balances for commercial loans. Accordingly, the Court must remand these issues to the ITA to determine

whether this additional information in the record as pointed out by plaintiffs has any significant impact upon the ITA's determination.

3. *State Tax Exemptions or Free or Low-Priced Land Incentives*

The Mexican government's reponse to the questionnaire indicated that none of the companies investigated received state tax exemptions. Administrative Record at 101–102, 256. During the verification, however, the ITA found that one of the foundries did benefit from a partial exemption of a state tax because it produced products exclusively for export. In light of this finding, as well as other evidence in the record that other of the firms also produced only for export, plaintiffs argue that the ITA's finding that only one of the firms received state tax exemptions is not supported by substantial evidence upon the record.

Although the Court should not weigh the evidence, "the Court must consider the record as a whole" and consider "evidence on the record which detracts from the substantiality of the evidence relied on by the agency in making its determination." *Carlisle Tire & Rubber Co.* v. *United States,* 9 CIT ———, Slip Op. 85–110, at 8 (October 24, 1985). Viewing the record as a whole, the Court is convinced that there is sufficient "evidence as a reasonable mind might accept as adequate to support [the] conclusion" that only one firm received state tax exemptions for exportation. *See Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197, 229 (1938). Onsite verification at three other firms did not disclose receipt of state tax benefits. It appears that at least one of these firms also produced only for export. *See* Administrative Record at 259. The ITA's determination is therefore sustained.

Concerning land at reduced prices, plaintiffs have not met their burden of pointing to any evidence in the record detracting from the ITA's conclusion that none of the firms investigated received this benefit.

4. *Calculation of State Tax Benefit*

Plaintiffs also challenge the ITA's calculations of the state tax benefit as received by the one firm by pointing out that if the ITA's calculations are correct, wages paid by the firm over the investigative period amounted to less than .09 percent of total sales. Defendant avoids this argument, countering only that plaintiffs have failed "to demonstrate in a concrete fashion that the net amount of the benefit has in fact been undervalued." Defendant's Brief at 22. Intervenors state that the ITA's verification report explains the method of calculation in detail and as well sets forth the records used to support the calculation. The ITA's explanation consists entirely of the following:

> We examined a schedule showing how much Fundicion Tijuana would have had to pay for 1982 had it not received such an exemption (M–1). The total tax amount for the period, January 1, 1982 through September 30, 1982 came to 260.23035.

The "records," or schedule referred to, consist solely of a column of unintelligible figures. *See* Administrative Record at 1065. There is no indication of where the numbers came from, who prepared them, or even what they purport to represent. This issue must therefore be remanded to the ITA for further clarification of the methodology employed by the ITA in calculating the amount of the state tax benefit received.

5. *Import Duty Reductions and Exemptions*

Plaintiffs contend that the ITA did not investigate import duty reductions and exemptions received for equipment imported prior to the 1982 investigative period. Although the ITA did find that *de minimus* benefits had been conferred under this program for certain tools imported from the United States, defendant claims that the verification report shows that none of the machinery or parts imported prior to 1982 was purchased from the United States. Since the record indicates that the ITA did inquire into the issue and plaintiffs have not overcome the government's presumption of correctness, the ITA's finding that only *de minimus* benefits from import duty reductions and exemptions is supported by substantial evidence on the record.

6. *Certificate of Fiscal Promotion (CEPROFI)*

The ITA determined that only one of the companies subject of the investigation received a CEPROFI tax credit, but for the manufacture of a product other than the iron-metal municipal construction castings under investigation and for a related increase in company employment. 48 Fed. Reg. at 8836. Plaintiffs contend that to the extent that the increase in employment was due to the production of municipal castings, the tax credit related to the employment increase is countervailable. The Court finds, however, that the ITA's finding that the employment increase was related to the production of a product other than the castings under investigation is a reasonable inference from the record, which indicates that municipal castings were a small part of the company's production and that the production of such castings was stopped in 1981, while the CEPROFI credit was granted for an increase in employment in 1980, 1981 and 1982. Administrative Record at 608 and 610. Accordingly, the Court finds that the ITA determination concerning CEPROFI benefits is supported by substantial evidence and is in accordance with law.

7. *Currency Exchange Rates*

Plaintiffs argue that the ITA improperly considered the exchange rate program that became operational after the period of the investigation while ignoring the program that was in effect at the time of the investigation. The dual level exchange control system alleged by plaintiffs to be countervailable was itself not enacted until September 6, 1982, shortly before the close of the January 1 to September 30, 1982 period under investigation. The pro-

gram actually analyzed by the ITA, however, was substantially modified, as announced in the *Diario Official* on December 13, 1982. This revised program would therefore apparently be the only one relevant to entries of the merchandise under investigation made after the publication of the ITA's affirmative preliminary determination on December 16, 1982. *See* Plaintiffs' brief at 26–27. The Court accepts as reasonable the ITA's consideration of the most current currency exchange program, which was in effect prior to the publication of the countervailing duty order on March 2, 1983, and the termination of the investigation. *See* C.F.R. § 355.6(b)(3).

8. *FOMEX Loan Guarantees*

Plaintiffs contend that the ITA did not investigate the FOMEX loan guarantee program. The ITA did, however, investigate the overall FOMEX program an make a determination as to which firms received *any* FOMEX benefits. *See* Administrative Record at 589–91. Intervenors additionally point out that the FOMEX credit insurance program is operated by COMESEC. Intervenor's Brief at 38. The ITA explicitly determined that COMESEC Mexican credit insurance at preferential rates did not confer a bounty or grant. 48 Fed. Reg. at 8837.

9. *Mexican Institute for Foreign Trade Benefits (IMCE)*

IMCE promotes Mexican foreign trade and coordinates efforts stimulating foreign trade, apparently through a variety of means including general advertising and promotion of Mexican products in international markets, as well as the provision of information and assistance directly to manufacturers, merchants, distributors and exporters. Administrative Record at 620. The ITA has verified "that none of the companies exporting the merchandise under investigation used any of the services offered by the IMCE." 48 Fed. Reg. at 8837. Plaintiffs nevertheless contend that the ITA failed to adequately investigate and determine what subsidy benefits may be conferred upon the iron-metal construction castings industry from general advertising and promotion. *See e.g.,* Administrative Record at 278–84 (promotional questionnaire, firm list, catalog and advertisement apparently distributed by IMCE). Although the ITA could have perhaps done more in looking into this aspect, the Court finds the ITA's reliance on the questionnaire response and verifications at IMCE and the firms, which indicated that none of the firms had received IMCE benefits, was reasonable.

10. *Full Investigation of Industrial Park Programs*

Based on the preliminary determination that several programs required additional information, *see* Administrative Record at 177, plaintiffs allege that the ITA made no further effort to acquire the needed information. Among the programs are land at reduced cost and state tax incentives (dealt with *supra* p. 9–10), FOMEX loan

guarantees (dealt with *supra* p. 13), benefits provided by National Financiere, S.A., and benefits of industrial park programs.

The ITA's finding regarding industrial parks is supported by substantial evidence. The verification report clearly shows that none of the companies investigated are located in industrial parks and therefore do not receive benefits under the Trust for Industrial Parks, Cities and Commercial Centers (FIDEIN). *See* Administrative Record at 595.

11. *Full Investigation of National Financeria*

Plaintiffs allege that the ITA failed to investigate and make determinations regarding programs administered by National Financeria. The ITA made explicit determinations regarding FIDEIN and FONEP, both programs administered by the National Financeria. *See* 48 Fed. Reg. at 8837, *see also* Administrative Record at 598. The Court finds that the ITA's actions and determinations in this regard to be supported by substantial evidence and in accord with the law.

12. *Industrial Energy Discounts*

The ITA's determination, *See* 48 Fed. Reg. at 8837, that Mexican producers of iron construction castings did not receive discounts on basic petrochemicals or industrial energy supplies is sustained. The determination is supported by the Mexican government's questionnaire response, Administrative Record at 103, 256, Administrative Record at 598–99, and on-site review of electric bills for each company verified. Administrative Record at 599.

13. *Failure to Investigate Foreign Debt Restructuring*

Plaintiffs allege that the ITA failed to make any investigation or determination regarding certain programs brought to the attention of the ITA during the investigation, as would be required by 19 U.S.C. § 1677d. Defendant appears not to have responded to this issue at all in its brief, while intervenors argue essentially that since the ITA should have made a negative determination regarding these programs, the failure to amend the notice of investigation to include these programs constitutes harmless error. Intervenors assert further that there is a lack of any suggestion in the verification that the foreign debt repayment schedule was altered in any way. Given that plaintiffs have not pointed to any evidence in the record supporting their claim other than their own conclusory statements made during the administrative proceeding, the Court affirms the ITA in not investigating and making a determination regarding this issue.

14. *Exchange Rates*

Plaintiffs challenge the ITA determination for failing to set forth the exchange rates used by the ITA in calculating the net benefit received by the Mexican iron castings exporters. Presumably plaintiffs are concerned with whether the exchange rates employed re-

sulted in an undervaluation of the bounty or grant conferred. Defendant answers this contention in a footnote stating that the ITA, pursuant to 31 U.S.C. § 5151(c), uses exchange rates published by the Secretary of the Treasury. Defendant's Brief at 16, n. 5. Alternatively, intervenors allege that the exchange rates used were set by the Mexican government and cites the Administrative Record at 499–503. The Court is unable to discern from the record and the briefs what exchange rates the ITA in fact used in this case. Accordingly, the Court must order a remand to determine what exchange rates were used and if they were in accordance with law.

15. *Verification Report*

Plaintiffs again challenge the conclusion of the verification report as part of the administrative record. Although the verification report was placed with the record subsequent to the final determination, the report consists of information and exhibits compiled prior to the final determination. Plaintiffs, had the opportunity to comment on the verification report during the remand to the ITA. As the report does not appear to be a *post hoc* rationalization of the final determination, *see e.g., Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 419–20 (1971), but rather a compilation of material gathered during the administrative proceeding, the verification report is properly part of the administrative record within the meaning of 19 U.S.C. § 1516a(b)(2)(A) (1982).

CONCLUSION

In order to determine whether all of the ITA's determinations are supported by substantial evidence upon the agency record, the Court requires further clarification and determination regarding the following challenges:

> (2) the calculation of FONEI and FOGAIN benefits,
> (4) the calculation of the benefit of the state tax exemption received, and
> (14) the exchange rates used by the ITA in calculating the net benefit used.

With respect to plaintiffs' other challenges in this case, the Court finds that the ITA determinations are supported by substantial evidence upon the record. Plaintiffs' motion for judgment upon the agency record is therefore granted in part and denied in part, and the case is remanded for further action consistent with this opinion.

(Slip Op. 85-131)

BALTIMORE SECURITY WAREHOUSE CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85-11-01690

Before CARMAN, *Judge.*

MEMORANDUM OPINION

[Plaintiff's motions for preliminary injunction and for review upon the agency record denied; Defendant's motion for summary judgment granted.]

(Decided December 13, 1985)

Allen, Thieblot & Alexander (J. Edward Martin, on the motion) for the plaintiff. *Richard K. Willard,* Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division (*Susan Handler-Menahem* on the motion) for the defendant.

CARMAN, *Judge:* Plaintiff, Baltimore Security Warehouse Company, moved for a preliminary injunction restraining the United States Customs Service (Customs) from revoking plaintiff's bonded warehouse status, and for review of Customs' final determination revoking such status.[1] Defendant United States cross-moved for summary judgment. On December 13, 1985, the Court heard argument. Ruling from the bench, the Court denied plaintiff's motion and granted defendant's motion for summary judgment. This opinion follows that order.

BACKGROUND

On February 9, 1983, Customs directed plaintiff to show cause pursuant to 19 C.F.R. § 19.3(e) (1982) (now 19 C.F.R. § 19.3(f)) why its bonded warehouse status should not be revoked. The notice stated the following grounds for revocation:

> As a result of a U.S. Customs Service Investigation, it was found that you did not adequately safeguard merchandise in your warehouse and that there was a high degree of pilferage at Baltimore Security Warehouse, Inc., particularly with regard to crystal glassware imported by Import Associates. It was also found that the merchandise and paperwork regarding your account with Import Associates were so poorly handled that the importer could not match items with the proper warehouse entry or importation.

Pursuant to 19 C.F.R. § 19.3(e), Customs could revoke the bonded status of a warehouse for a variety of reasons, including:

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[1] In its complaint filed with this court, plaintiff requested the relief, *inter alia,* of an injunction. In its brief, plaintiff argued that the Custom's determination be overturned. The Court understood plaintiff to move for a preliminary injunction pursuant to Rule 65(a) and for judgment upon the agency record pursuant to Rule 56.1. Upon consent of both parties, the Court ordered the motions consolidated under Rule 65(a)(2).

(3) The warehouse proprietor or an officer of a corporation which has been granted the right to operate a bonded warehouse is convicted of or has committed acts which would constitute a felony, or a misdemeanor involving theft, smuggling, or a theft-connected crime;

(4) The warehouse proprietor does not provide secured facilities or properly safeguard merchandise within the bonded warehouse.

Plaintiff requested a hearing on the issue of revocation, which was held on April 13, 14 and 18, 1983. Both parties filed post hearing memoranda. On October 5, 1983, the hearing officer made her recommendation that plaintiff's bonded warehouse status be revoked, which she forwarded to the Regional Commissioner of Customs for the Northeast Region (Commissioner). By letter dated November 18, 1985, the Commissioner informed plaintiff that its bonded warehouse status was revoked, effective ten days after receipt of the letter.[2]

By complaint dated November 29, 1985, plaintiff asked this court for a temporary restraining order enjoining Customs from revoking its bonded warehouse status. The court, per Senior Judge Newman, issued a temporary restraining order on December 2, 1985, pursuant to Rule 65(b). The order was to expire on December 12, 1985.

This case was assigned to me on December 3, 1985. I ordered that the motion for preliminary injunction be combined with the action on the merits, pursuant to Rule 65(a)(2), and ordered that the temporary restraining order be extended to December 19, 1985, pursuant to Rule 65(b), with consent of the parties, in order to provide for the oral argument to be held on December 13, 1985.

OPINION

Plaintiff maintained that the Commissioner's determination revoking its bonded warehouse status should be overturned on a variety of grounds: 1) Customs did not have jurisdiction over the subject matter of this action, 2) the agency proceedings were procedurally defective, 3) improper evidence was admitted at the administrative hearing, 4) the agency findings were not supported by substantial evidence in the record, and 5) the agency action was barred by the equitable doctrine of laches.

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[2] The text of the letter was as follows:

This is to inform you that I have decided to revoke the bonded warehouse status of Baltimore Security Warehouse, pursuant to my authority in 19 CFR 19.3(f). I am sending this decision to you because you are the legal representative of Baltimore Security Warehouse and ask you to notify the appropriate parties.

A hearing on this matter was held on April 13, 14 and 18, 1983, in Baltimore, Maryland. My decision is based on the recommendation of the hearing officer that the bonded status of Baltimore Security Warehouse be revoked and the evidence presented at that hearing which indicates violations of section 19.3(e)(3) and (4) of title 19 of the Code of Federal Regulations. These sections provide that the bonded status of a warehouse may be revoked if an officer of a warehouse has committed acts which would consititute a felony, or a misdemeanor involving theft, or if the warehouse proprietor does not provide secured facilities or properly safeguard merchandise within the bonded warehouse. The allegations based on these sections have been amply proved at the hearing.

This decision takes effect 10 days after receipt of this notice.

1. *Jurisdiction*

In its complaint plaintiff averred that Customs did not have jurisdiction because the property involved was not bonded and Customs had jurisdiction only over bonded property.[3] Plaintiff did not press this argument in its brief. Customs has authority under 19 U.S.C. § 1556 (1982) to promulgate rules and regulations for establishing bonded warehouses. 19 C.F.R. § 19.3(e), promulgated pursuant to that authority, provides that bonded warehouse status may be revoked if Customs finds that the proprietor or corporate officer has been convicted of, or has committed acts constituting specified crimes. The section does not require that these convictions or acts have any relation to bonded merchandise. Customs acted within the scope of its statutory authority as it was not exercising any power over particular property, but rather its power to establish bonded warehouses under 19 U.S.C. § 1555 (1982).

2. *Procedural Defects*

Plaintiff claimed that the agency proceedings were defective in several ways. Plaintiff first contended that the Commissioner's determination did not include findings of fact or reasons for the revocation, as required by the regulations. The regulations provide that "[T]he Regional Commissioner shall thereafter render his decision in writing, stating his reasons therefor." 19 C.F.R. § 19.3(e). The Commissioner's letter stated that plaintiff's bonded warehouse status was being revoked because plaintiff had violated 19 C.F.R. §§ 19.3(e)(3) and (4), and the allegations based on these sections had been "amply proved at the hearing." The reason for the revocation could not be more clear. Moreover, the letter referred to proofs at the hearing and also to the findings of the hearing officer. This was adequate to inform plaintiff of the findings upon which the determination was based. Plaintiff next claimed that the recommendation of the hearing officer did not include findings of fact. On the contrary, the recommendation includes numerous factual findings, which formed the basis of the recommendation.[4] Plaintiff urged that the hearing officer did not independently assess the evidence on the record because her findings of fact incorporated the proposed findings of fact submitted by counsel for Customs. The adoption of proposed findings is a not uncommon judicial practice and, standing alone, does not indicate that the adjudicator did not independently assess the evidence.

Plaintiff next claimed that the findings contained in the recommendation were improper because the hearing officer did not

[3] At the agency level, plaintiff made a motion to dismiss for lack of jurisdiction and because the agency was not following the Administrative Procedures Act § 554(d) (5 U.S.C. § 554(d) (1982)). In its complaint, plaintiff asked the court to review the agency's denial of that motion, but pursued only the issue of jurisdiction. The Court notes that plaintiff showed no violation of § 554(d).

[4] For example, the hearing officer found that merchandise was seized from Smith Sales, that the merchandise had been imported by Import Associates and stored in bond at plaintiff's warehouse, and that plaintiff had sold the merchandise to parties who testified at the hearing. These are not conclusory statements, as plaintiff suggests, but rather basic findings of fact.

impose upon Customs the burden of proving its case beyond a reasonable doubt. One of the grounds for revoking plaintiff's bonded warehouse status was the finding that plaintiff had

> committed acts which would constitute a felony, or a misdemeanor involving theft, smuggling or a theft connected crime.

19 C.F.R. § 19.3(e). The proceeding below was a civil and not a criminal proceeding, and the reasonable doubt standard does not apply. The hearing officer was persuaded that the plaintiff committed the acts complained of, and that is sufficient. On review, this Court will sustain that determination so long as it is supported by substantial evidence on the record. *See generally American Spring Wire Corp.* v. *United States,* 8 CIT 20, 590 F. Supp. 1273 (1984), *aff'd* 760 F.2d 249 (1985).

Plaintiff next complained that it did not receive a copy of the hearing officer's recommendation until after the revocation determination had issued and plaintiff had brought its case to this court. Plaintiff pointed to no statute or regulation, however, requiring Customs to furnish it with a copy of the recommendation. The official record contained the recommendation and plaintiff could have received it at any time by simply requesting a copy. Moreover, plaintiff has not shown that it was in any way prejudiced because it did not receive a copy.

Plaintiff's final procedural complaint was that the Commissioner did not make his determination on the full record. Plaintiff reached this conclusion from statements made by counsel for defendant, during a teleconference on December 6, 1985, that exhibits from the hearing had been sent to Washington, D.C. and then on to New York. The Commissioner issued his determination from Boston. Such a statement, without more, is inadequate to show that the Commissioner did not consider the complete record.

3. *Evidence at the Hearing*

At the administrative hearing, plaintiff objected to the introduction of hearsay evidence. Although plaintiff did not press this issue in its brief to the court, its complaint does not mention evidentiary objections made at the administrative hearing. Section 557(d) of the Administrative Procedure Act (5 U.S.C. § 557(d)) provides that:

> any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly prejudicial evidence.

Administrative adjudicatory proceedings are not governed by the formalized strict Federal Rules of Evidence but by the Administrative Procedure Act. Hearsay evidence is admissible in such proceedings.

Plaintiff also argued at length in its brief that certain evidence admitted at the hearing was seized from premises known as Smith Sales, in violation of the fourth amendment to the United States

Constitution. A party lacks standing to assert a fourth amendment violation where it was not on the premises at the time of the search, alleges no proprietary or possessory interest in the premises, or is not accused of a possessory crime. *Brown* v. *United States* 411 U.S. 223, 229 (1973). Since none of these situations existed, plaintiff had no standing to request suppression of the evidence.

4. *Substantial Evidence*

Plaintiff asserted that certain factual findings of the hearing officer were in error. This Court must uphold agency action unless it is unsupported by substantial evidence in the record. *See* 5 U.S.C. § 706(2)(E) (1982). At the hearing, Customs introduced substantial evidence that plaintiff had committed the acts complained of. Plaintiff also introduced evidence tending to exculpate it, and offered alternative theories to explain evidence introduced by Customs. It is not for the Court, however, to weigh the conflicting evidence. It is sufficient that there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *American Spring Wire,* 8 CIT 20, Slip Op. 84-83 (July 11, 1984) (quoting *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 477 (1951)). Although plaintiff clearly was not satisfied by the findings of the hearing officer, since there was relevant evidence from which reasonable inferences could be drawn to support the conclusion determined by the hearing officer, the determination of the hearing officer must be permitted to stand.

5. *Laches*

Plaintiff's final ground for arguing that the agency action should be overturned was that Customs was barred by the equitable doctrine of laches. To establish the defense of laches, a party must show both unreasonable delay and some prejudice caused by the delay. *Costello* v. *United States,* 365 U.S. 555 (1965). Customs held the hearing in April of 1983 but did not act to revoke plaintiff's bonded warehouse status until November of 1985. Whether or not the delay was unreasonable, plaintiff has failed to show that it was prejudiced. Plaintiff can hardly claim prejudice when the delay allowed it to keep its bonded warehouse status during that time.

Conclusion

Plaintiff failed to show that the agency action was procedurally defective or that the determination was not supported by substantial evidence upon the record. Because of the Court's disposition of the case on its merits, the Court also denied plaintiff's motion for a preliminary injunction. Plaintiff's motions have been denied, the Court granted defendant's motion for summary judgment and dismissed the case.

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